No. 863

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JOHN F. DAVIS, CL

# In the Supreme Court of the United States

OCTOBER TERM 1966

SHELL OIL COMPANY,
*Appellant,*

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
*Appellees.*

On Appeal from the Supreme Court of the State of California

## Jurisdictional Statement

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vs.

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On Appeal from the Supreme Court of the State of California

## Jurisdictional Statement

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### I.

### JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of California, entered on June 6, 1966, setting aside the judgment of the District Court of Appeal, Third Appellate District, and affirming the judgment of the trial court. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## II.

## OPINION BELOW

The opinion of the Supreme Court of the State of California is reported in 64 Advance California Reports 773, 414 P. 2d 820, 51 Cal. Rptr. 524. The opinion of the District Court of Appeal, Third Appellate District, is reported at ..... Cal. App. 2d ....., 46 Cal. Rptr. 653. Copies of the letter opinion and the judgment of the trial court, the opinion of the District Court of Appeal, as modified, and the opinion of the California Supreme Court, including the dissenting opinion, are attached hereto as Appendix A.

## III.

## JURISDICTION

This suit was brought before the Superior Court, State of California, to seek a refund of taxes paid under California Revenue and Taxation Code, sections 6001 et seq. The judgment of the trial court denying the refund was at first reversed by the District Court of Appeal, but this reversal was subsequently vacated by the decision of the California Supreme Court which affirmed the judgment of the trial court. The judgment of the California Supreme Court was filed on June 6, 1966, and notice of appeal was filed in that court on August 31, 1966. By order of the California Supreme Court, the time for docketing the case was extended to December 15, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583 (1954); *Freeman v. Hewit,* 329 U.S. 249, 91 L.Ed. 265 (1946); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 91 L.Ed. 80 (1946).

## IV.

## QUESTIONS PRESENTED

1. May the State of California impose a gross receipts tax on sales of fuel oil which is sold for consumption by ships of foreign and domestic registry as they ply the high seas carrying export cargo to foreign ports?

2. Is fuel oil which is delivered aboard ships of foreign (or domestic) registry for consumption as they ply the high seas to foreign ports an "export" immune from state taxation under the Federal Constitution?

3. Does the constitutional prohibition against state taxation of "exports" apply only where it is proved that the commodity is landed or off-loaded in a foreign country, or is it enough that the commodity leaves the United States with assurance of non-return?

4. Is the purchase and consumption of fuel oil aboard ships of foreign (or domestic) registry engaged in transporting export cargo across the high seas to foreign ports a part of the "process of exportation" protected against state taxation by the Federal Constitution?

5. Where fuel oil is sold and delivered aboard ships of foreign (or domestic) registry for consumption while they are engaged in transporting cargo in interstate and/or foreign commerce, does a tax on the sale:

A. Constitute an unconstitutional burden on such commerce; or

B. Constitute a conflict with existing federal regulations, which "occupy the field" of taxation of fuel oil sold for consumption by ships engaged in foreign or intercoastal commerce, and impliedly prohibit state taxation of such sales?

## V.

### STATUTES INVOLVED

The relevant statutes are as follows: sections 6051, 6052, and 6352, California Revenue and Taxation Code; 19 U.S.C. 1309 and 26 U.S.C. 3451 (now 26 U.S.C. 4221). These statutes are set forth in Appendix B hereto.

## VI.

### STATEMENT

Appellant (hereinafter referred to as Shell) is in the business of selling fuel oil on a world-wide basis to ocean-going ships engaged in transporting cargo in international trade. Shell maintains fueling facilities at ports throughout the world, and offers this service on a continuing basis. In 1950 Shell, through its delivery facilities located at various California ports, delivered fuel oil to several different ships which may be categorized as follows:

Ships registered in foreign countries and engaged exclusively in foreign commerce;*

Ships registered in the United States and engaged exclusively in foreign commerce;† and

Ships registered in the United States and engaged in interstate commerce.‡

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*On August 15, 1950, Shell loaded fuel oil at Martinez, California, on board the Canadian vessel *SS World Trotter*, which was laden with cargo bound for and subsequently delivered to Keelung, Formosa, and Yokohama, Japan.

†On September 29, 1950, Shell loaded fuel oil at Wilmington, California, on board the American vessel *SS A. G. Brown*, which was laden with cargo bound for and subsequently delivered to Cristobal, Panama Canal Zone.

‡On July 9, 1950, Shell loaded fuel oil at Wilmington, California, on board the American vessel *SS Five Forks*, which was laden with cargo bound for and subsequently delivered to New York, New York.

The deliveries to each of these ships were made pursuant to certain written agreements which were all executed outside California. Under the procedure prescribed in these agreements, the owner and/or operator of the ship was required to cable Shell in New York or Ontario, Canada, or its agent at the fueling port, at least fourteen days in advance of the ship's arrival in the port, and to specify the estimated time of arrival in port and the quantity of fuel needed. Upon arrival of the ship in port, it loaded the amount of fuel ordered either from a fueling dock or barge. The invoice for the fuel was thereafter submitted either to the ship's captain or to its owner and/or operator, which in two cases at least were in foreign countries (namely, the *SS World Trotter* and the *SS Panagiotis Coumantaros*). Added to each invoice was the California sales tax. The tax was paid to Shell by the ship owner or operator, and Shell in turn paid it over to the state tax authorities.

Each ship involved herein loaded cargo at the port at which it took on fuel oil, and then sailed to its next port of call, where it discharged the cargo. None of the ships discharged any cargo in California after fueling. And, in the case of the foreign ships, all cargo loaded in this country was delivered to a foreign port.

All of the fuel oil loaded on board each ship was consumed on the high seas, while the ship was engaged in carrying goods in foreign (or interstate) commerce. Without this fuel, none of the ships could have moved from California.

Shell now seeks a refund of the tax collected and paid with respect to the sales of fuel oil made to each of these ships. Shell has agreed to return any refund that it receives to the ship owners or operators from whom it was originally collected.

The federal questions were raised in the trial court by the complaint for refund filed by Shell. The complaint sought a refund of taxes levied and collected with respect to sales of fuel oil to ships engaged in interstate and foreign commerce, on the grounds that the imposition and/or collection of the tax was repugnant to the Federal Constitution, citing Article I, Section 8, Clause 3, and Section 10, Clause 2, and Article VI, Clause 2. The trial court entered judgment denying the refund, and the appeal taken therefrom was based upon the contentions that the trial court had erroneously sustained the validity of the taxing statute in the face of the constitutional prohibitions upon taxation of exports and of foreign and interstate commerce. The District Court of Appeal, in a unanimous decision, reversed the judgment of the trial court with respect to the ships carrying export cargo (namely, the *SS World Trotter* which sailed from California to Keelung, Formosa), and struck down this application of the sales tax, as repugnant to Article I, Section 10, Clause 2. It otherwise affirmed the judgment of the lower court. Thereafter, the California Supreme Court granted a hearing, and, with one justice dissenting, set aside the opinion of the District Court of Appeal and held that the taxing statute did not violate any provision of the Federal Constitution.

## VII.

## THE QUESTIONS ARE SUBSTANTIAL

The issues raised in this appeal involve a tax placed on goods of domestic origin precisely as they leave the United States for entry into the world economic market. The burden imposed by this tax is of fundamental importance to the shipping industry and to the nation's multimillion dollar trade in ships' stores.

Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Federal Constitution prohibits the

imposition of such a burden by the individual states. This prohibition was originally enacted (and has since been enforced), both to assure that the interior states would have equal opportunity with the seaboard states to participate in foreign trade free of local impediments, and to prevent a local diversity of taxes and regulations damaging to the entire country. The location of the seaboard states obviously puts them in a favored geographical position to erect a "toll-gate" or "turnstile" through which foreign commerce must pass, and thus to control and to exact revenue from that commerce for their exclusive benefit. Such practices, while profitable for the seaboard states, not only discriminate against the commerce of the interior states but also create the prospect of a variety of confusing and conflicting local controls which the Constitution was specifically designed to eliminate.

The decisions of the Supreme Court have consistently and repeatedly invalidated state taxes of every type which had the effect of erecting an economic barrier to the movement of export cargo enroute through the seaport to a foreign destination. The judgment of the California Supreme Court is in direct conflict with the holdings of these decisions, with the policy which underlies the Imports-Exports Clause, the Commerce Clause, and relevant federal statutes, and with the holding of *Gulf Oil Corp. v. McGoldrick*, 281 N. Y. 647, 22 N.E. 2d 480 (1939), *as modified*, 282 N. Y. 612, 25 N.E. 2d 392 (1940), *aff'd*, 309 U.S. 414, 84 L. Ed. 840 (1940).

### 1. Fuel Oil Purchased for Consumption by Vessels Bound for Foreign Ports Is an "Export" Protected by the Import-Export Clause from Levy of a State Sales Tax.*

The *SS World Trotter*, a vessel operated by a Canadian corporation, registered under the laws of Canada and fly-

*This section relates to sales of fuel oil to foreign and domestic vessels engaged in foreign commerce.

ing the Canadian flag, purchased a supply of fuel oil, an indispensable ships' store, at Wilmington, California, title and possession vesting in the Canadian purchaser as the fuel was pumped aboard. The vessel then sailed, loaded with an export cargo, for Keelung, Formosa. If the fuel oil had been carried as cargo, consigned to an individual at Formosa, the sale would clearly have been exempt from tax as an export. (Article I, Section 10, Clause 2 of the Constitution provides "No State shall . . . lay any Imposts or Duties on Imports or Exports . . ."; *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80 (1946).) Because the fuel oil was purchased for consumption on board the vessel, the court below has ruled that the commodity was not an export and not protected from tax by the Constitution.

By this distinction the court below has justified a turnstile tax that has exacted several millions of dollars in tribute (Respondents' Petition for Hearing, California Supreme Court, p. 38, n. 11) from goods of domestic origin for the privilege of passing out of the United States into the world beyond. The Supreme Court has never held that a commodity can be an "export" under the Constitution *only if* it arrives in a foreign country. Such a distinction finds no justification in the objectives sought by the draftsmen of the Constitution or in the collateral authorities in the field. Furthermore, the California Supreme Court decision is contrary to *Gulf Oil Corp. v. McGoldrick, supra*, 282 N. Y. 612, in which the New York Court of Appeals, on similar facts, held that a sales tax on fuel oil sold as ships' stores was prohibited, *inter alia*, by the Import-Export Clause of the Federal Constitution. (*Aff'd on another ground*, 309 U.S. 414.)[1]

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1. The unofficial report of the *Gulf Oil* case, *supra*, which appears at 25 N.E. 2d 392, is incomplete. It fails to indicate that the affirmance by the New York Court of Appeals was on the grounds of Article I, Section 10, Clause 2 and Article VI, Clause 2 of the Federal Constitution.

Numerous authorities have indicated that the exports clause was adopted to prevent the "mercantile" (seaboard) states from exacting a tribute from merchandise passing through their harbors and into the stream of world commerce. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 19 L.Ed. 382, 386 (1869); *Richfield Oil Corp. v. State Board of Equalization, supra*, 329 U.S. 69, 76; 2 Farrand, *Records of the Federal Convention*, 305-308, 358-363, 441-443. Under the Confederacy the individual states had reserved control over commerce. (Morison, *The Oxford History of the American People*, 279; *Articles of Confederation* 1777, Article IX.) Reassignment of this power to the Federal Government was one of the major innovations of the Constitution. (Morison, *op. cit.*, 310; *The Federalist No. 45* (Wesleyan University Press Ed. 1961), 314.) The newly independent nation had quickly learned both the perishable quality of its foreign trade and the importance of that trade to the welfare of the nation. (Morison, *op. cit.*, 282-283, 313, 314; Farrand, *The Development of the United States*, 67; 1 Bancroft, *The Constitution of the United States*, 186.) The total elimination of state controls on exports was believed a necessary remedy for the national ills previously suffered.

In the instant case, two types of commodities were loaded aboard the *SS World Trotter* at a California port: cargo consigned to buyers in Formosa and fuel oil to be consumed on the voyage to Formosa. Each of these commodities had to pass through the port and on to the ship in the same way. Each originated in the domestic economy and was irrevocably committed to leave the United States. ". . . [N]othing equivocal in the transaction . . . created even a probability that the oil would be diverted to domestic use." *Richfield Oil Corp. v. State Board of Equalization,*

*supra*, 329 U.S. at 83.[2] Each commodity was sold to a foreign purchaser in the course of international trade. In each case, the opportunity of the state to obstruct or interfere with that trade occurred at the port. In terms of the impact upon our foreign trade, nothing distinguishes the Formosan consignee from the Canadian ship operator: each purchased a commodity for removal from the United States economy; each purchaser uses the commodity beyond our shores; each utilizes the mechanics of foreign exchange to pay for the commodity, thus affecting our balance of payments; and each will purchase elsewhere if the price of the commodity becomes uncompetitive by reason of high taxes. If the sale to the Formosan consignee cannot be taxed as an "export," and it clearly cannot (*Richfield Oil Corp. v. State Board of Equalization, supra*), then nothing in the logic of the constitutional prohibition permits taxation of the sale to the Canadian vessel operator. *Gulf Oil Corp. v. McGoldrick, supra*, 282 N.Y. 612.

Two of the principal cases in this field cited by the court below to support its conclusion that the sale is taxable, are in fact irreconcilable with that conclusion. The *Richfield* case, *supra*, is cited as requiring "a destination in a foreign country." In its discussion of the law that opinion did not once make such a reference. On the contrary, the Court actually said that the cargo was "sold for shipment abroad" (329 U.S. at 78); that the ship was "to carry the oil abroad" (at 82); and that "nothing . . . created even a probability that the oil would be diverted to domestic use" (at 83). The Supreme Court was clearly concerned only with the dispatch of oil into the world market outside of the United States and with the assurance of its irrevocable diversion from the United States economy.

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2. In fact such fuel is subject to confiscation if taken off the vessel at a United States port, 46 U.S.C. 883.

The California Supreme Court decision in *Matson Nav. Co. v. State Board of Equalization*, 136 Cal. App. 2d 577, 289 P.2d 73 (1955), applied the same test. Therein the court refused to permit a tax upon the sale of an ocean-going vessel, the *SS Matsonia*, to a Panamanian company. The exchange of title and possession occurred in California. It was in fact a practical impossibility that the vessel could ever come to rest in the foreign country, that is, in the sense of being off-loaded and combined with the goods of that country. Yet the court was undisturbed by this obvious fact. In its own statement of the issues before it the court mentioned only that the sale was to a "foreign purchaser for use in international trade" and did not even mention a foreign destination. (289 P.2d 75.) The court held that the vessel was an export because it "was irrevocably committed to foreign trade." (289 P.2d 77)

The court below refers to three cases (*Alaska v. Arctic Maid*, 366 U.S. 199, 6 L.Ed.2d 227 (1961); *Dooley v. United States* 183 U.S. 151, 46 L.Ed. 128 (1901); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 19 L.Ed. 383 (1869)) including language which might imply that exportation involves delivery in a foreign country. A careful reading of these cases, however, discloses that each case involved only domestic commerce. "Exports" were mentioned only to contrast them with commodities delivered in a *state* or *territory*. Refinements within the field of *foreign trade* such as herein presented were not considered. Distinctions which were not considered or intended by the court should not be attributed to its general language. (*Woodruff v. Parham*, 75 U.S. 123, 148.)

One case cited below (*Swan and Finch Co. v. United States*, 190 U.S. 143, 47 L.Ed. 984 (1903)) does in fact contain the statement that an "export" must be landed in a

foreign country. *The Swan and Finch case is not a constitutional law case and is not a binding precedent on this court.* The *Swan* case involved an *import* duty. A "drawback" of a prior customs duty was granted by statute when goods of foreign origin were processed domestically and later "exported." The petitioner was seeking to bring the sale of such an article, fuel oil destined for consumption at sea, within the definition of "export," as used within the *drawback statute,* so as to secure a refund of the import duty only. The court gave several compelling reasons for denying the drawback under such circumstances.

*Although no constitutional issue had been raised,* the court made the gratuitous and uncalled for remark that the word "export" as used in the Constitution and laws of the United States "*generally* means transportation of goods from this to a foreign country." (190 U.S. at 145.) (Emphasis added.) This is true: generally all exports *do* go into a foreign country. *Stores for ships and airplanes are almost the only special cases.* Where special circumstances exist, this Court is alert to observe them and to accord them the relevance they deserve (*e.g., Hoover & Allison Co. v. Evatt,* 324 U.S. 652, 89 L.Ed. 1252 (1945), and *Gulf Fisheries v. Darrouzet,* 17 F.2d 374 (D.C. 1926), deciding that an "import" need not come from a foreign country). The logic and the historical meaning of the Import-Export Clause in the Constitution were not involved, nor were they even discussed or alluded to in the *Swan* case.

The foregoing analysis applies to ships of all nations engaged in foreign trade. Foreign ships, however, have a special advantage, for fuel they buy does have a destination "in" a foreign nation for all purposes of any significance to this issue. The fuel oil comes within a foreign dominion as soon as it is pumped on board. The internation-

ally recognized rule of law (*The Lotus,* Decision of Permanent Court of International Justice, 1927, Series A No. 10, Series C No. 13) which extends the jurisdiction of a country to the "internal economy" of the ships which fly its flag is characterized by the court below as a "fiction." (App. A, p. 27.) It is admittedly a "fiction" to view a foreign flag vessel as a territorial extension (6 Webster's Works, 306-307) of the country whose flag it flies, but this is a valid metaphorical expression to describe the jurisdictional powers possessed by the country of registry. Restatement, *Conflicts of Law,* 405. When a seaman steps on board a vessel of foreign registry berthed in a United States harbor, he enters the jurisdiction of the flag and immediately becomes "subject to all its obligations and liabilities." *Rainey v. New York and P.S.S. Co.,* 216 F. 449, 454 (9th Cir. 1914). This case, and the many others upholding the validity of the jurisdiction of the nation's flag (*Old Dominion SS Co. v. Gilmore,* 207 U.S. 398, 52 L.Ed. 265 (1907); *Scandinavian Airlines System, Inc. v. County of Los Angeles,* 56 Cal.2d 11, 363 P.2d 25 (1961)), leave no doubt that such nation could control fuel oil the instant it is loaded, so that it could tax the fuel, forbid its purchase, or exercise any of the other prerogative of sovereignty which arise from an article being physically located in a foreign country.

The court below falls into a curious error in purporting to correlate the meaning of the words "import" and "export," again citing a case involving only domestic commerce. (See *Dooley v. United States, supra;* App. A, p. 25.) The proper symmetry of the correlation is this: if "import" means "brought into the country" irrespective of origin, then "export" should mean "sent out" irrespective of destination. The symmetry is destroyed by the court's incorrect

assumption that an "import" must come *from* a foreign country. It need not do so. Fish harvested at sea and brought into this country are "imports." *Booth Fisheries Corp. v. Case,* 182 Wash. 392, 47 P.2d 834 (1935); *Gulf Fisheries Co. v. Darrouzet, supra.* Goods leaving this country and consumed at sea are the exact opposite.

**2. A Tax on the Sale of Fuel Oil, Sold for Consumption Aboard Vessels Carrying Only Export Cargo, Falls on the Tax-Immune "Process of Exportation."***

The Supreme Court long ago confirmed that the Import-Export Clause is not limited merely to prohibiting a tax on the exported article itself. The prohibition reaches further. It applies to immunize from taxation the whole "process of exportation" (*Empresa Siderurgica v. County of Merced,* 337 U.S. 154, 93 L.Ed. 1276 (1949)), that is, to all of the transactions, documents and activities which are necessary, in a commercial and in a physical sense, to transport the exported goods overseas. Unlike interstate commerce, the "process of exportation" cannot be made to pay its own way. *Richfield Oil Corp. v. State Board of Equalization, supra,* 329 U.S. at 75-76. The prohibition against state taxation is absolute; otherwise, the protection given to "exports" would be a nullity.

In early exportation cases, the Supreme Court applied a strict *economic burden test.* It suggested that *any tax* which was likely to have the effect of increasing the cost of "exportation" (or its logical corollary, "importation") violated the Import-Export Clause. This idea was first suggested in *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 (1827), where the court struck down a tax on the occupation of importation as *in substance* a tax on the imported

*This section relates to sales made to foreign vessels and to domestic vessels engaged in foreign commerce.

goods themselves. (12 Wheat. at 445.) Later, in *Fairbank v. United States,* 181 U.S. 283, 45 L.Ed. 862 (1901), the Supreme Court nullified a tax on bills of lading covering goods exported in foreign commerce, on the ground that the Constitution required *"a freedom from any tax which directly burdens the exportation."* (181 U.S. at 293.) (Emphasis added.) Thereafter, this same economic burden test was again applied to invalidate a tax on the purchase of insurance policies covering the marine transit of exports, as being "as much a burden on exporting as if it were laid on the charter parties, the bills of lading or the goods themselves." *Thames and Mersey Marine Ins. Co. v. United States,* 237 U.S. 19, 27, 59 L.Ed. 821 (1915).

The test has received its broadest application in *United States v. Hvoslef,* 237 U.S. 1, 59 L.Ed. 813 (1915), where the Court had before it a tax levied on the purchase of a ship charter covering an ocean-going vessel engaged in export trade. The charter was characterized as a lease of the vessel for a voyage to carry cargoes of goods to foreign ports. The Court rejected the tax as "in substance a tax on the exportation." (237 U.S. at 17, 18.)

More recently, in *Canton R.R. Co. v. Rogan,* 340 U.S. 511, 95 L.Ed. 488 (1951), the Supreme Court refused to apply the economic burden test as the sole criterion of immunity. There the court considered a tax on the gross receipts of a railroad engaged in hauling exports to the dock, from where they were eventually loaded on board a carrier for shipment overseas. Concerned that the economic burden test was too broad if applied to transportation of exports *prior to embarkation and prior to the overseas voyage,* the Court indicated that if this were the *only* test it would create a zone of immunity leading "back to every forest, mine and factory in the land." (340 U.S. at 515.)

To avoid such a result, the court imposed for the first time a *spatial limitation* on the economic burden test. "Exportation" by the Court's definition, begins and ends at the "water's edge." (340 U.S. at 515.) Any activity leading *up to the dock* was not within the "process of exportation"; *the necessary and logical corollary is that activities and transactions covering the exports after embarkation are immune.* Thus, the tax in the *Canton* case was easily valid, even though an economic burden, because it fell on proceeds derived from transporting the cargo prior to embarkation.

It is imperative to recognize that the *Canton* decision *did not* purport to impair or undermine the economic burden test utilized by the Supreme Court in the earlier "exportation" cases. It simply halted the further extension of the economic burden test to activities and transactions leading up to overseas shipment of exports. Properly interpreted, it means that "exportation" is limited to transactions, documents and activities indispensable to and embraced within the overseas voyage.

By both the economic burden test and the spatial test, the present tax, applied to sales of fuel oil to foreign-bound ships, invades the immunity created by the Import-Export Clause. The economic impact of the tax falls on the operator of the vessel, since either as a result of business practice or state law (California Rev. and Tax. Code, section 6053) the oil company adds the amount of the sales tax to the invoice price of the fuel oil. See *Richfield Oil Corp. v. State Board of Equalization, supra,* 329 U.S. at 84-85; *cf. Clary v. Basalt Rock Co.,* 99 Cal. App. 2d 458, 461-462, 222 P.2d 24 (1950); *Roth Drug, Inc. v. Johnson,* 13 Cal. App. 2d 720, 736, 57 P.2d 1022, (1936). It is the practical operation of the tax that counts. (*American Oil Co. v. Neill,* 380 U.S. 451, 455, 14

L.Ed. 1 (1965).) The fuel oil is purchased for consumption by vessels while transporting exports—as such, the fuel is a prime and indispensable part of the voyage. The operator of the vessel cannot move the vessel or its cargo to a foreign port without paying the added cost of the tax. In essence, it is a cost he pays for the ocean voyage. The greater the volume of cargo, and the longer the voyage, the more fuel the operator must purchase and the more tax he must pay. The state performs no function with respect to the ocean voyage, and has no interest in it. Yet, the measure of the state's revenue is directly related to the length of the voyage. The operator must of necessity pass the economic burden of the tax on to the exporters, each bearing a share proportioned on the basis of the volume or weight of its cargo and the distance of the transportation. The economic burden of the tax cannot be escaped. In substance, it constitutes nothing other than a levy on the ocean transportation of export cargo.[3]

Furthermore, qualification under the spatial test of the *Canton* case is equally clear. The purchase of the fuel oil admittedly occurred in California before the vessel departed from the state. But so did the purchase of the bill of lading (*Fairbank v. United States, supra*), the marine in-

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3. As a further means to protect foreign commerce from state exactions, the Federal Constitution prohibits the states from imposing a duty of tonnage. Article I, Section 10, Clause 3, provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage . . ." This precludes any tax upon the vessel as a charge for "entering or leaving a port." (*United States v. Hvoslef, supra*, 237 U.S. at 17.) If a tax proportioned on the basis of the tonnage of the vessel cannot be imposed, then the present exaction on the vessel operator, proportioned to the length of the voyage, should likewise be invalid. In terms of their interference with foreign commerce, the two taxes cannot be distinguished. See *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 363 P.2d 25 (1961); see also *Hays v. Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855) (prohibiting property tax on foreign vessels).

surance policy (*Thames and Mersey Marine Ins. Co. v. United States, supra*), and the vessel charter for the transoceanic voyage (*United States v. Hvoslef, supra*), occur before the vessel departed from the state. The point at which the purchase occurs is irrelevant; it is the *subject* of the purchase which is important. If it relates to and is an indispensable part of the *overseas shipment,* it is exempt. The fuel oil here was purchased for consumption on the overseas voyage. It was consumed after the export cargo had been loaded aboard the vessel, and was used to transport the cargo overseas to its foreign destination. Its use and application was solely to move export cargo after it had crossed the "water's edge."

The California Supreme Court erred in ruling that the fuel oil was "distinct and separable from the articles of export," and that it was therefore taxable. (App. A, p. 32.) The test is not whether the fuel oil was distinct and separable from the articles of export. *The true test is whether or not the fuel oil is necessary and indispensable to the overseas voyage of the article of export.* A charter of a ship (*United States v. Hvoslef, supra,* 237 U.S. at 17-18) is "distinct and separable from the articles of export"; it covers a single vessel upon which hundreds of different articles may be carried. A single charter may be purchased to move a whole shipload of cargo from a domestic to a foreign port (just as the fuel oil), *and the charter itself has no direct relation to any single item of cargo.* Yet the purchase of the charter cannot be taxed because it is an indispensable part of the overseas transportation of exports, and therefore cannot be subjected to an economic burden. The fuel oil is no less indispensable to exportation and must therefore be given like immunity.

### 3. A Tax on the Sale of Fuel Oil to Vessels Engaged in Foreign and Interstate Commerce Imposes Direct and Multiple Burdens in Violation of the Commerce Clause of the Federal Constitution.*

Characterization of the sales of fuel oil as interstate and foreign commerce cannot be disputed under these facts: (1) Execution of the contract of sale outside the state of California (Clerk's Transcript, p. 18); (2) remittance of the purchase price made from and received at a point outside California (Clerk's Transcript, pp. 20-21); and (3) delivery of the fuel in California (Clerk's Transcript, p. 16). Sales made under such circumstances touch more than one state, thus raising the possibility of multiple taxation.

Furthermore, since ocean-going vessels are, for purposes of dominion and taxation, treated as ambulatory extensions of the state of their registry, taxation of the vessel and its stores, including fuel oil, may be imposed at any time by the state of the vessel's registry, irrespective of the physical location of the vessel. *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855); *cf., Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 363 P.2d 25 (1961) (applying the same rule to foreign aircraft). As a result, delivery of the fuel aboard each of the vessels simultaneously exposed it to taxation by the state of the vessel's registry. The tax could take the form of a use tax (*Monomotor Oil Co. v. Johnson*, 300 U.S. 86, 78 L.Ed. 1141 (1934)), a property tax (*Brown v. Houston*, 114 U.S. 622, 29 L.Ed. 257 (1885)), or a sales tax (*McGoldrick v. Berwin-White Coal Mining Co.*, 309 U.S. 33, 84 L.Ed. 565 (1940)).

Where a transaction is exposed to the possibility of multiple taxation, the Supreme Court has interpreted the

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*This section relates to sales made to all of the vessels involved herein.

Commerce Clause to prohibit *any taxation whatsoever.* There is no necessity for proving that multiple burdens are in fact imposed.

> "[The] unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, *and not on the contingency that some other state may first have subjected the commerce to a like burden.*" (*Gwin, White & Prince v. Henneford,* 305 U.S. 434, 440, 83 L.Ed. 272 (1939).) (Emphasis added.)

See also *Freeman v. Hewit,* 329 U.S. 249, 252, 91 L.Ed. 265 (1946); *Gulf Oil Corp. v. McGoldrick, supra,* 282 N.Y. 612; *City of Philadelphia Tax Review Board v. Norton, Lily & Co.,* 189 Pa. Super. 91, 149 A.2d 672 (1959), *aff'd,* 157 A.2d 60. See, Comment, 73 HARV. L. REV. 586 (1960).

The California Supreme Court relied upon several cases which involved purely *intrastate* activities (such as withdrawal of fuel from storage). Such cases did not raise the possibility of multiple taxation, and therefore are not applicable precedents. *Eastern Air Transport v. Tax Commission,* 285 U.S. 147, 76 L.Ed. 673 (1932); *Edelman v. Boeing Air Transport,* 289 U.S. 249, 77 L.Ed. 1155 (1933).

The lower court also suggested that the recent case of *General Motors v. Washington,* 377 U.S. 436, 12 L.Ed.2d 430 (1964), holds that the abstract possibility that duplicative taxes might be levied by another jurisdiction is irrelevant. In view of the firm language to the contrary in *Gwin, White & Prince v. Henneford, supra,* 305 U.S. at 440, and *Freeman v. Hewit, supra,* 329 U.S. at 252, this cannot be a correct interpretation of the Supreme Court's position. Such an interpretation would mean that taxes long prohibited by the Supreme Court would now be allowed. *E.g., J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 82 L. Ed. 1365 (1938); *Gwin, White & Prince v. Henneford,* 305 U.S. 434, 83 L.Ed. 272 (1939); *Crew & Levick Co. v. Penn-*

*sylvania*, 245 U.S. 292, 62 L.Ed. 295 (1917); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 933 (1947). Clearly, the Supreme Court intended no such result.

**4. Federal Regulations Occupying the Field of Taxation of Fuel Oil Sold for Consumption by Vessels Engaged in Foreign Commerce Impliedly Prohibit State Taxation.***

Federal tax statutes and federal regulations relating to fuel sold for consumption on ships engaged in foreign commerce all exempt such fuel (and other ships stores) from direct taxation, treating it in every instance as an "export" from the United States. Research discloses no contrary expression of intent by the legislative or executive branches of the Government. In fact, so diligently has Congress protected fuel oil from taxation that it *reversed* the earlier-mentioned *Swan & Finch Co. v. United States, supra* (when that decision ruled that fuel oil sold as ships' stores was not an "export"). In response to the decision Congress adopted a new enactment expressly providing that fuel oil sold as ships' stores is to be exempt as an "export." (19 U.S.C. 1309, as amended; section 630 of the Internal Revenue Act of 1932, now 26 U.S.C. 4221, as amended.) This has remained the congressional policy.

The principal federal regulations are: 19 U.S.C. 1309, exempting from import duty fuel oil imported in bond, retained in bond and sold out of bond for use as stores for ships in foreign commerce; 26 U.S.C. 4221, exempting from federal manufacturers' excise tax fuel oil sold for use as stores for ships engaged in foreign commerce.[4] T.D. 6344, 1959-1 Cum. Bul. 776 further imple-

*This section relates to sales of fuel oil to foreign and domestic vessels engaged in foreign commerce.

4. This exemption appeared in 26 U.S.C. 3451 at the time of the imposition of the tax in this case. The text of section 3451 is set forth in Appendix B of this brief.

ments this policy. S.T. 886, 1939-2 Cum. Bul. 387 is even more striking evidence. There the Internal Revenue Service determined that a federal excise tax on bituminous coal (which is also used as fuel) was *impliedly* limited, not by the specific statutory exemption, but by the general and comprehensive *policy* of the Federal Government against taxation of ships' stores.

The Federal Executive has taken a similar view. In situations where an export license is required for a ship's cargo, one is also required for its fuel,[5] and fuel oil is required to be entered on the ship's outward foreign manifest.[6]

The leading authority in this field is *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84 L.Ed. 840 (1940). In that case the Court held that the federal policy *impliedly* prohibited a local sales tax on sales of fuel oil for use as ships' stores, on the ground of federal occupation of the field. The relevant facts in the *Gulf Oil* case, *supra*, are identical to the facts of this case except in one respect: the fuel oil in that case had been imported in bond, free of customs duty, refined in bond and sold out of bond, whereas the present case involves *domestic* fuel. A detailed study of the federal policy shows that this difference is irrelevant and that the tax presented in this case is also impliedly forbidden.

Consider first the statutory scheme. The federal authorities cited above include two statutes specifically exempting ships' stores from federal taxation. The statute found in Title 19 (Customs Code) exempts fuel oil from import duty, by granting a "drawback" of such duty (if the fuel is at all times retained in customs custody and sold as

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5. 15 Code of Federal Regulations, chap. III, sections 370.26, 371.13, 372.7(c).

6. 15 Code of Federal Regulations, chap. I, section 30.21.

ships' stores directly out of bond) on the ground that the fuel is "exported." (19 U.S.C. 1309.) The other statute, found in Title 26 (Internal Revenue Code), has no relation to customs bonding. (26 U.S.C. 4221.) It is therefore the statute expressing the federal policy which should control the facts of this case. It relieves sales of fuel oil, sold for use as ships' stores, from the federal manufacturers' excise tax, again on the ground that the fuel oil is to be free from tax as an "export." Both statutes express a policy of Congress to protect fuel oil, imported or domestic, from taxation where it is used in the foreign trade of the United States. Hence, the states should not be able to tax domestic oil if they cannot tax imported oil.

Consider next the language of the relevant statutes. Each statute states a flat prohibition against the imposition of a federal tax, the one a customs duty, and the other a manufacturers' excise tax. No language appears in either statute to justify a distinction which would immunize imported oil from a state tax but permit such a tax on domestic oil.

Moreover, the legislative history of the statutes suggests clearly that their purpose was to protect from *taxation* fuel oil sold to vessels engaged in foreign trade. In the *Gulf Oil* case (309 U.S. at 427) the Court referred to the following statements from the legislative debates:

> "At the present time, ships under the American flag or foreign flags, engaged in the various services mentioned here, all have opportunity to buy this fuel or oil at foreign ports, and since we have put a tax on that oil they have been doing it. At the present time we are not getting any revenue out of our vessels engaged in these services. We will not get any revenue out of them if this section passes, but Americans would get the business of selling to them, which is at present prevented by the imposition of the tax." (Congressional Record, 73rd Cong., 1st Sess., p. 3214.)

Relying on this and other expressions of congressional intent, the Court concluded:

> "The obvious tendency of the exemption . . . [as regards imported fuel when] used as ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which has been lost by the imposition of the tax. *That tendency and the tendency of the sale of tax-free fuel to vessels engaged in foreign commerce to promote the commerce* were considerations to be taken into account by Congress in fixing the terms of the statute, and its adoption as a means of regulating and promoting foreign commerce was within the congressional power . . . That such was the purpose of the present legislation is confirmed by its history. [Citing authorities.]" (309 U.S. at 427.) (Emphasis added.)

See also Senate Report No. 58, 73d Cong., 1st Sess., p. 3, discussing similar purposes for section 630 of the Revenue Act of 1932, now 26 U.S.C. 4221.

The lower court erred in failing to recognize the comprehensive scope of the federal policy. It failed to recognize that Congress has acted to exempt both *imported and domestic* oil from taxation. The *Gulf Oil* decision correctly interpreted the federal policy in construing the statute pertaining to *imported* fuel oil (19 U.S.C. 1309); this Court should be guided by the same policy in now interpreting the applicable federal statute pertaining to *domestic* fuel oil. (26 U.S.C. 4221.) Both statutes were passed with a view to accomplishing the same ends—namely, to promote foreign commerce by relieving American manufacturers from a competitive disadvantage in sales of fuel oil to be used as ships' stores.

Otherwise, if the federal policy is limited to promote foreign trade only for oil imported in bond, then imported oil would enjoy a tax immunity that oil of domestic origin did not have. Domestic oil would suffer a tax discrimination and would be unable to compete effectively with imported oil. Congress has spoken with equal clarity of purpose with respect to both types of oil; it clearly did not intend to be heard with respect to only one.

## CONCLUSION

It is submitted that the decision of the California Supreme Court fails to recognize that the California sales tax, as applied to the sales of fuel oil involved herein, is invalid and unconstitutional, on the grounds that it violates the *express* prohibition against state taxation contained in the Import-Export Clause, and the *implied* prohibition against state taxation contained in the Commerce Clause and in specific congressional enactments. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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**(Appendices Follow)**